

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
BEST RAY PIZZA, INC.	: DETERMINATION
	DTA NO. 813768
for Revision of a Determination or for Refund	:
of Sales and Use Taxes under Articles 28 and 29	:
of the Tax Law for the Period September 1, 1989	:
through May 31, 1992.	:

Petitioner, Best Ray Pizza, Inc., 341 Lexington Avenue, New York, New York 10016, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1989 through May 31, 1992.

The Division of Taxation, represented by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), moves for summary determination in the above-captioned proceeding. The motion was returnable August 4, 1995. Petitioner, appearing by Jack M. Portney, C.P.A., filed papers in opposition to the motion. Based on the affidavits of Daniel LaFar, Geraldine Mahon, Jack M. Portney and Christina L. Seifert and the exhibits attached to the motion papers and papers in opposition to the motion, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.

FINDINGS OF FACT

The Division of Taxation ("Division") issued to petitioner, Best Ray Pizza, Inc., a Statement of Proposed Audit Adjustment, dated March 12, 1993, for sales and use taxes due

for the period September 1, 1989 through May 31, 1992.

By letter dated April 7, 1993, petitioner's representative, Jack M. Portney, C.P.A., informed the Division that petitioner "protest[s]the attached proposed audit adjustment of \$180,530.23 and request[s] a conference." In the letter, Mr. Portney requested the Division to contact him "to work out a conference date at your earliest convenience." Petitioner submitted a return receipt indicating that this protest letter was sent by certified mail on April 7, 1993 to the NYS Dept. of Taxation and Finance, Queens District Office, 97-77 Queens Blvd., Third Floor, Rego Park, New York 11374.

The Division issued to petitioner a Notice of Determination (Assessment No. L-007541141-3), dated July 1, 1993, for sales and use taxes due in the amount of \$109,280.83, plus penalty and interest, for the total amount of \$186,853.58. In support of its allegation that a copy of this notice was sent to both petitioner and its representative on July 1, 1993, the Division submitted an affidavit of Daniel LaFar, an affidavit of Geraldine Mahon, and a certified mail record dated July 1, 1993.

In the affidavit of Geraldine Mahon, the principal clerk of the Case and Resource Tracking System ("CARTS") Control Unit, she explained how notices of determination were generated and processed for mailing. As noted by Ms. Mahon, each notice is sent by certified mail and recorded on a certified mail record next to a certified control number. The certified control numbers are listed in numerically consecutive order.

Attached to Ms. Mahon's affidavit were two certified mail

records, dated July 1, 1993. One record consists of three pages. On page 1, listed next to the first certified number, P 911 205 732, is notice number L 007541141 and the name and address of Jack M. Portney, 2050 Center Avenue, Fort Lee, New Jersey 07024. Page 1 contains a U.S. Postal Service postmark of July 1, 1993 and page 3 contains a U.S. postmark of July 1, 1993 and the total pieces of mail and amount of postage that corresponds to the total amounts listed on the three-page certified mail record. The third page also contains initials next to the total pieces of mail received at the post office.

The second mail record consists of 28 pages, the last page of which contains initials next to the total pieces of mail received at the post office, as well as the U.S. Postal Service postmark of July 1, 1993. On page 4 of that record, petitioner's name and address at 341 Lexington Ave., New York, New York 10016-0935, are listed next to notice number L-007541141 and certified number P 911 004 089. Page 4 also contains a postmark of July 1, 1993. In the affidavit of Daniel Lafar, the principal mail and supply clerk in the Division's mail and supply room, he described the operations and procedures of the mailroom used to ensure the proper mailing of each notice. He noted that on page 23 of the second certified mail record, a piece of mail assigned the certified control number of P 911 004 290 was pulled from the record and that this deletion is reflected in the total mail count of pieces received by the post office. Taking into account this deletion, the total number initialed on the last page of the second certified mail

record corresponds with the total number of certified control numbers listed in the 28-page document.

The Division sent to petitioner a Correspondence Acknowledgement Notice, dated November 8, 1993, referring to assessment number L-007541141-3, protest number K-331273972-3 and sales tax for the tax period ending May 31, 1992.

By letter dated November 15, 1994, Mr. Portney informed the Division that it had erroneously issued a warrant, dated September 26, 1994, with respect to petitioner's sales and use taxes. In that letter, he stated as follows:

"The Warrant is in error because I am awaiting a conference with your agency requested by me on April 7, 1993, and acknowledged by New York State on November 8, 1993. Until that conference is held, there can be no collections."

By letter dated January 5, 1995, the Division informed Mr. Portney that the Bureau of Conciliation and Mediation Services had received his correspondence indicating that a request for a conciliation conference had been previously filed for Best Ray Pizza, Inc. The Division stated that a review of its records did not indicate receipt of a timely request and that if he had proof of such a protest, he should mail substantiating documentation within 20 days of the date of the Division's letter.

Mr. Portney responded by letter dated January 24, 1995, and attached a copy of the April 7, 1993 letter requesting a conference, a copy of the proposed audit adjustment, a copy of the Correspondence Acknowledgement Notice, and a copy of the receipt for certified mail stamped April 7, 1993. This letter

and attached documents were stamped received by the Bureau of Conciliation and Mediation Services on January 30, 1995.

A conciliation conferee thereafter issued a Conciliation Order, dated March 3, 1995, denying a request for a conciliation conference on the ground that the request was filed late. The conferee stated that the notice was issued on July 1, 1993 and that the request was not received until January 30, 1995.

Mr. Portney filed a petition, dated April 10, 1995, on behalf of Best Ray Pizza, Inc. alleging, inter alia, that petitioner did not receive a Notice of Determination; that prior to issuance of the alleged Notice of Determination, no response was received or conference granted in response to petitioner's April 7, 1993 letter protesting the proposed audit adjustment and requesting a conference; and that petitioner received an acknowledgement on November 8, 1993 of its April 7, 1993 request for a conference.

The Division filed an answer, dated June 2, 1995, alleging, inter alia, that it lacked knowledge or information sufficient to form a belief as to petitioner's allegation that it received an acknowledgement from the Division of its April 7, 1993 request for a conference. The Division affirmatively stated that petitioner's request for a conference was untimely made and that petitioner had the burden of proving that the protest was timely.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides that a Notice of Determination shall finally and irrevocably fix sales tax owing

unless the person against whom it is assessed applies within 90 days to the Division of Tax Appeals for a hearing (see, Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992). The taxpayer has the option of protesting the notice by requesting a conciliation conference with the Bureau of Conciliation and Mediation Services in lieu of filing a petition for a hearing with the Division of Tax Appeals if the 90-day period to petition for a hearing has not elapsed (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[a]; 4000.5[c]). Absent a timely protest to the assessment of a tax liability, the Division of Tax Appeals has no jurisdiction to hear the merits of the case (Tax Law § 2006[4]).

Tax Law § 1147(a)(1) provides that any period of time which is prescribed by the giving of notice commences to run from the date of mailing of such notice. Section 1147(a)(1) also requires the Division to mail notices of determination by registered or certified mail, and further provides that the mailing of such notice shall be presumptive evidence of receipt of such mailing by the person to whom it was addressed. When the timeliness of a petition or request for a conciliation conference is at issue, the Division has the burden of demonstrating proper mailing (Matter of Air Flex Custom Furniture, supra; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). To show that a notice was properly mailed to the taxpayer by certified or registered mail, the Division must provide evidence as to the

general mailing procedure of such notice and that this procedure was followed when mailing the notice in question (Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111, 112; Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra).

In this case, the Division has demonstrated that it properly sent the Notice of Determination by certified mail on July 1, 1993. The affidavits of Geraldine Mahon and Daniel LaFar constituted sufficient evidence as to the general mailing procedures and the certified mail record is evidence that these procedures were followed. Specifically, the names and addresses of petitioner and Jack M. Portney were listed next to the notice number contained on the Notice of Determination and next to a certified number arranged in numerically consecutive order on the certified mail records. Also, the U.S. Postal Service postmark was stamped on the individual pages on which the names and addresses appeared, as well as on the last page of the certified mail records, along with initials and the total number of pieces of mail received by the post office (see, Matter of Sabando Auto Parts, Tax Appeals Tribunal, March 9, 1995; Matter of Turek, Tax Appeals Tribunal, January 19, 1995). Therefore, the Division has provided presumptive evidence of receipt of such mailing by the person to whom it was addressed.

B. A party may move for summary determination pursuant to 20 NYCRR 3000.5(c) after issue has been joined. The regulations provide that the motion may be granted if the movant has sufficiently established that no material and triable issue of

fact is present, and the motion may be denied "if any party shows facts sufficient to require a hearing of any issue of fact." When a movant has presented evidence sufficient to establish a prima facie fact, bare allegations of the opponent to the motion are insufficient to create a genuine issue of fact (Shaw v. Time-Life Records, 38 NY2d 201, 207, 379 NYS2d 390, 396; State Bank of Albany v. McAuliffe, 97 AD2d 607, 467 NYS2d 944, 945). As noted above, the Division has presented evidence sufficient to establish a presumption of receipt of the notice by both petitioner and its representative, Jack M. Portney. It has been held that a mere denial of receipt is insufficient to overcome this presumption (Matter of T. J. Gulf, Inc. v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d 97). Thus, the Division prevails on this issue.

C. Petitioner claims that the Division cannot issue a Notice of Determination prior to granting its request for a conference with the district office. Petitioner has cited no authority for this principle and none has been found. Petitioner implies that the Division's acknowledgement of the April 7, 1993 protest stays the Division from issuing a Notice of Determination. It is unclear what correspondence or protest the Division was acknowledging in the Correspondence Acknowledgement Notice. Although the Division issued this notice, the Division shed no light on the events that generated it and merely denied knowledge sufficient to form a belief as to petitioner's allegation that the notice acknowledged the April 7 protest. In any event, even if this notice constituted the

Division's acknowledgement of petitioner's April 7, 1993 protest and request for a conference, such notice does not prevent the Division from issuing a notice of determination. In fact, the notice of determination was issued approximately four months prior to the Correspondence Acknowledgement Notice dated October 22, 1993.

Furthermore, a request for a conference with the district office in Queens does not constitute a request for a conference with the Bureau of Conciliation and Mediation Services. The regulations define a request for a conciliation conference as "the written application for a conciliation conference" (20 NYCRR 4000.1[e]). Although petitioner requested a conference in its April 7, 1993 letter, that request appears to have been directed to the auditor in the district office to discuss the proposed audit adjustments and was not a specific request for a conference with the Bureau of Conciliation and Mediation Services. A letter protesting a statement of proposed audit adjustment cannot satisfy the statutory requirement that a petition or request for a conference be filed within 90-days after issuance of a Notice of Determination. In sum, a protest filed prior to the issuance of the Notice of Determination cannot function as the equivalent of a protest of the notice itself for the purpose of the 90-day limitation period (see, Matter of Yegnukian, Tax Appeals Tribunal, March 22, 1990; Matter of West Mountain Corp. v. State of NY Dept. of Taxation and Finance, 105 AD2d 989, 482 NYS2d 140, affd 64 NY2d 991, 489 NYS2d 62). Thus, petitioner has not demonstrated that there is

a triable issue of fact warranting denial of this motion.

D. The Division of Taxation's motion for summary determination is granted and the petition of Best Ray Pizza, Inc. is dismissed.

DATED: Troy, New York
October 12, 1995

Faulkner

/s/ Marilyn Mann

ADMINISTRATIVE LAW JUDGE